Joo Chiat Road, Singapore. Originally there were three defendants, but, as the third defendant had not been served with the writ and had ceased to reside in the premises, his name was ordered to be struck out from the title to the proceedings.

It was not disputed that the premises were let by the plaintiff in 1951 to V. P. Anjapillay, the first husband of the first defendant; that his contractual monthly tenancy was determined on the 30th April, 1956, by a notice to quit dated the 29th February, 1956; that he became a statutory tenant thereafter; and that he died on the 16th May, 1958.

It was proved that the first defendant was residing in the premises with her two children by the deceased on the 16th May, 1958; that she married her first husband in 1952; that she had been residing in the premises from 1952 except for a few months in 1958; that she married the second defendant in 1959; and that she was residing in the premises at the date of the hearing of this action with the second defendant, her child by him, and her two children by her first husband.

Counsel for the plaintiff contended that the first and second defendants were trespassers but conceded that the first defendant was protected by section 16 of the Control of Rent Ordinance, if the premises were domestic premises. Section 2 of the Ordinance defines "domestic premises" as "a building or part of a building used wholly or chiefly as a separate dwelling."

The question which fell to be considered was, therefore, whether the premises were used chiefly as a separate dwelling not only at the date of the death of the first defendant's first husband but also at the date of the hearing of this action. The ground floor excluding the five-foot way is 78 feet long. The front portion consists of a large room 43 feet long. The rear portion, which is 35 feet long, consists of a kitchen, a bathroom, and a lavatory. At both the material dates, the front part of the large room was used as a sundry goods shop, while the remaining part of the room and the rear portion of the premises were used as a dwelling. Of the total length of 78 feet, the shop took up 23 feet. As 70% of the floor space was thus used as a dwelling, it seemed to me that the premises were used to a greater extent for dwelling purposes. For this reason I came to the conclusion that the premises were used chiefly as a separate dwelling at both the material dates.

In my opinion, the first defendant was protected by section 16 of the Ordinance. As the second defendant was her second husband, I failed to see how he could be treated as a trespasser.

I therefore dismissed the claim and ordered the plaintiff to pay the defendant the costs of the action.

Claim dismissed.

Solicitors: *Braddell Bros.; K. K. Bezboruah.*

A OMNIBUS CO. LTD. v. GOVERNMENT OF THE FEDERATION OF MALAYA

[C.A. (Thomson C.J., Hill J.A., and Ong J.) December 12, 1960]

[K.L. — F.M. Civil Appeal No. 44 of 1960]

Income Tax — Deduction at source — Debt to Government — Income Tax Ordinance, 1947, s.40.

The appellant is a limited liability company. Its share capital consists of 15,010 fully-paid shares of $1 each. Its only asset, apart from a small sum in cash at the Bank, consists of 31,192 fully-paid shares of $1 in another company, the *B* Omnibus Company (Perak) Ltd. The only business which it carries on in fact is to receive dividends from the Company and distribute them to its shareholders.

The *A* Company, the *B* Company and the shareholders in both companies are all resident in the Federation.

The general practice of the *A* Company was to distribute to its shareholders by way of dividends practically all the money it received from the *B* Company. The present litigation arises from what it did in 1956 in accordance with that practice.

In 1956 the tax liability of the *A* Company was $14,722, that sum being calculated on its actual profits for the year 1955. In 1956, the gross dividends payable by the *B* Company to the *A* Company amounted to $77,980 from which the *B* Company deducted $23,394 for Income Tax under section 40 of the Income Tax Ordinance. The amount actually received by the *A* Company in 1956 thus amounted to $54,486, but at the same time it received from the *B* Company certificates of deduction under section 40 amounting to $23,394.

After administrative expenses, the profit for the year was $54,257. The Directors then declared dividends amounting to 500% on the share capital less 30% Income Tax. Payments to the shareholders, all in 1956 amounting to $52,535 were made but they accompanied these payments with dividend certificates purporting to be "pursuant to section 40(2) of the Income Tax Ordinance" stating that the dividends amounted to $75,050, which is 500% of the share capital, and that $22,515 had been deducted being "Income Tax at 30%."

The Income Tax authorities taking the view that what the *A* Company had done was to pay dividends amounting to $75,050 from which there had been made an Income Tax deduction of $22,515, claimed that by virtue of the provisions of section 40 of the Ordinance a debt was owed to the Government consisting of the amount by which the amount of the deductions exceeded the amount of Income Tax payable by the Company that difference being $7,793. Smith J. gave judgment for the Government. The Company appealed.

Held (Hill J.A. and Ong J., Thomson C.J. dissenting): (1) for any part of section 40 to apply, the following conditions must be present namely (i) the Company must be resident in the Federation, and (ii) the Company itself must have paid tax or be liable to pay tax at the fixed rate so as to be entitled to deduct tax in respect of dividends. The section applies only to an income from which tax is deductible;

(2) the income received and distributed by the appellant company was not a chargeable or assessable income as tax deductions in full had already been made by the *B* Company, and no further deductions could legally be made therefrom, and the appellant company was not therefore entitled to make any.

Cases referred to:—

(1) *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892), 19 I.A. 203, 215; I.L.R. 20 Cal. 296.

(2) *R.* v. *Norfold Co.* 60 L.J. Q.B. 380.

(3) *Ex p. Walton* (1881) 17 Ch. D. 746 at p. 756.

(4) *Inland Revenue Commissioners* v. *Cull* [1938] 2 K.B. 109, 120; [1938] 1 All E.R. 467.

COURT OF APPEAL, appeal from the decision of Smith J.

B. K. Das for the appellant.

H. E. Cashin for the respondent.

Thomson C.J.: The facts of this case are not in dispute although there is considerable controversy as to the legal consequences which flow from them regarding the liabilities of the appellant company towards the Government.

The appellant is a limited liability company known as the *A* Omnibus Company Limited. Its share capital consists of 15,010 fully-paid shares of $1 each. Its only asset, apart from a small sum in cash at the Bank, consists of 31,192 fully-paid shares of $1 each in another company, the *B* Omnibus Company (Perak) Limited which carries on what would seem to be a highly profitable business as a transport undertaking. The only business which the *A* Company carries on in fact is to receive dividends from the *B* Company and distribute them to its shareholders.

The *A* Company, the *B* Company and the shareholders in both companies are all resident in the Federation and all of them are of course liable to be assessed separately to Income Tax as individual taxpayers. I say "of course", and the truth of that proposition is obvious, but at times it seems to have been lost sight of by the *A* Company in the arrangement of its affairs, although here it is to be observed that both companies were in existence in the halcyon days when there was no Income Tax.

The general practice of the *A* Company was to distribute to its shareholders by way of dividends practically all the money it received from the *B* Company. The present litigation arises from what it did in the year 1956 in accordance with that practice.

In 1956 the tax liability of the *A* Company was $14,722, that sum being calculated on its actual profits for the year 1955. In 1956, however, the *B* Company paid out a substantially larger sum by way of dividends than it did in 1955. The gross dividends payable in the year 1956 to the *A* Company amounted to $77,980 from which the *B* Company deducted $23,394 for Income Tax under the provisions of section 40 of the Income Tax Ordinance. The amount actually received by the *A* Company in 1956 thus amounted to $54,486, but at the same time it received from the *B* Company certificates of deduction under section 40 amounting to $23,394 which would in due course be available to set off against its own Income Tax liability. In its accounts the *A* Company then treated the sum of $77,980 as a receipt and treated the sum of $23,394 as a payment and after taking into account the trifling administrative expenses of the Company this produced a profit for the year of $54,257.

It was for the Directors of the *A* Company to decide how much of this profit should be distributed to the shareholders during the year and they passed two resolutions declaring dividends amounting in all to 500% on the share capital less 30% Income Tax, these dividends "to be payable forthwith". In pursuance of these resolutions they made payments to the shareholders, all in 1956, amounting in all to $52,535 but they accompanied these payments with Dividend Certificates purporting to be "pursuant to section 40(2) of the Income Tax Ordinance" stating that the dividends amounted to $75,050, which is 500% on the share capital, and that $22,515 has been deducted being "Income Tax at 30%".

Now, as has been pointed out the tax payable by the Company for the year 1956 was $14,722. The Income Tax authorities took the view that what the *A* Company had done was to pay dividends amounting to $75,050 from which there had been made an Income Tax deduction of $22,515 and that therefore by reason of the provisions of section 40 of the Ordinance there was constituted a debt to the Government consisting of the amount by which the amount of the deductions exceeded the amount of Income Tax payable by the Company, that difference being $7,793. The Company did not accept that view of their position and after some preliminary discussion the present proceedings were commenced by the Government for the recovery of that sum of $7,793.

Throughout, the position of the Company has been that they never in fact deducted anything for Income Tax from the dividends they distributed to their shareholders, that they were compelled to issue the dividend certificates in the form in which they did issue them by the mandatory terms of section 40, that they never in fact had the money they are said to have deducted and that in fact all their liabilities to Income Tax had from time to time been discharged in full by the *B* Company out of the deductions made by them, which were in fact made, from the dividends paid by the *B* Company to the *A* Company. This was set out in their defence and counter-claim.

In the event Smith J. gave judgment for the Government as prayed and against that decision the Company have now appealed.

Smith J. held that deductions of $22,515 had in fact been made by the Company from the dividends paid but the reason he so held was that in his opinion by reason of the Dividend Certificates they had issued they were estopped from saying anything else. That reasoning has been strongly attacked before us and indeed has not been supported by the respondent. For myself, with great respect for the learned Judge I am unable to accept it. The law relating to estoppel is the same here as in England (*see Sarat Chunder Dey* v. *Gopal Chunder Laha* [1])

and is set out in section 115 of the Evidence Ordinance which reads as follows :—

"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing."

Here there is no question of the Government being caused or permitted to believe anything other than the true and exact state of affairs. The Company's candour has at all times been complete and beyond criticism and at all times the Income Tax authorities have been fully aware of the way in which it was managing its affairs.

But although the reasoning of Smith J. be not accepted it does not follow that his ultimate conclusion, which was that the Company owes the Government $7,793, is wrong and I now propose to state my own views on the point.

Before doing so I would make two preliminary observations which may help to clarify a not very simple issue.

In the first place, what the Government is suing for is not Income Tax as such but a debt which has come into existence by reason of the provisions of section 40 of the Ordinance.

In the second place, it is not correct to say that the Company was compelled by law to issue the dividend certificates it did issue. It is true that it was in effect compelled by the provisions of section 40, to which I am coming shortly, to issue certificates in that form but the contents of those certificates was something that was within the control of the directors. Once the directors had declared a dividend then the amount of the dividend so declared had to be stated and the amount of the deduction, which also had to be stated, was 30% of that sum. But the amount of the deduction depended on the amount of the dividend and that was something in the control of the directors. If, for example, the directors had declared a dividend of 250% instead of 500% the amount of the deduction shewn on the certificates would have been less than $14,722, the amount of the Income Tax payable, and the present proceedings could not have arisen. I am not saying for one moment that the directors are not at liberty to arrange the affairs of the Company as they see fit or that they are not at liberty to declare such dividends as they see fit. The point is that if they arrange their affairs in the light of an incorrect view of the taxation law and if this produces unfortunate consequences they can have no complaint as to the operation of that law. They may complain as to the law itself, but that is a different matter.

Turning now to section 40 of the Income Tax Ordinance, that section has been amended several times since its original enactment but during the whole of the year 1956 its provisions were as follows.

Under section 40(1) a company is entitled to deduct from any dividend paid to a shareholder "tax" at the rate of 30% of such dividend. There is no need to make any such deduction. though it is the usual practice of companies to do so, but if the deduction is made it must be at the rate of 30% of the dividend. "Tax" means Income Tax (see section 2) but it is to be noted that so far as the section goes it is not Income Tax for any particular year and the amount of the deduction has no relation to the amount of Income Tax paid or payable by the Company in any particular year, it is in all cases 30% of the dividend paid. By section 42, however, when any such deduction is made and the dividend from which it is deducted is included in the chargeable income of any person then the amount of the deduction can be set off against the "tax charged on that chargeable income". I shall return to the point but I would observe here, for to my mind it goes to the root of the matter, that for income tax purposes a dividend is normally deemed to be part of the recipient's chargeable income not for the year in which it is received but for the year after the year in which it is received.

Returning to section 40, sub-section (2) goes on to provide that when a company pays a dividend it must, whether or not it makes a deduction under sub-section (1), furnish each shareholder with a certificate showing the amount of the dividend paid and in addition one of two things, either the amount that has in fact been deducted by reason of sub-section (1) or, if there has been no deduction, the amount which the Company was entitled to deduct.

Sub-section (3) requires that at the end of each year a company shall make a return to the Comptroller of Income Tax of deductions made from dividends during the year. Then comes sub-section (4) which is the crucial one here. Disregarding sub-section (5) which has no application in the present case but read in the light of so much of sub-section (3) as is applicable it provides that where the amount of the deduction made by the company under sub-section (1) in any year of assessment exceeds the amount of tax payable by the company in respect of the same year of assessment as the year in which the deduction is made, then the amount of such excess shall be a debt due by the company to the Government and shall be recoverable as a debt.

Finally, sub-section (6) deals with the case where no deduction has in fact been made under sub-section (1). It provides that for the purposes of the section as a whole, which include of course the provisions of sub-section (4) which have just been mentioned, where no deduction has in fact been made from any dividend then two things are to be deemed to have happened. One is that the amount of the dividend, whatever it may have been in fact, is to be deemed to be the greater amount which if

30% had been deducted from it would have left the amount actually paid. The other is that from this notional dividend 30% has in fact been deducted.

To my mind what happened in the case of the *A* Company in 1956 fell fairly and squarely within the provisions of the section. The section deals with dividends paid, not with dividends declared. In 1956 the Company paid in dividends the sum of $52,535. That was the amount they actually paid and that was the amount the shareholders actually received. But by reason of sub-section (6) the amount paid and received was to be deemed to be $75,050 and a sum of $22,515 was to be deemed to have been deducted from that sum of $75,050. This led to two results. One result was that these figures were the ones which had to be shewn in the dividend certificates, as was indeed done. And here it has to be borne in mind that section 42 which provides for such certificates being used as a set off against the shareholders' tax draws no distinction between certificates shewing tax actually deducted and certificates shewing as deductions amounts which have not in fact been deducted but which the company is entitled to deduct. The other result is that the provisions of sub-section (4) are attracted. The tax payable by the *A* Company in respect of the year 1956 was in fact $14,722 and the difference between this amount and $22,515, the amount deemed to have been deducted, became a debt due to the Government.

The truth is that confusion may have arisen here by reason of some failure to appreciate that in each year income tax is charged not on the taxpayer's actual income for that year but on what is called his statutory income for that year, the measure of which is his income for the previous year (see section 31).

Thus in the case of the *A* Company the Income Tax payable by them for 1956 was not to be calculated on the profits they made in the year 1956 but on the amount of profits they made in the year 1955. It is admitted that the amount of tax payable in 1956 was $14,722 and not $22,515 which would probably be the amount of Income Tax payable by them in 1957. In the present proceedings, however, we are only concerned with the position as at 31st December, 1956.

The provisions of section 40 may in some cases appear to be oppressive. The object of them, however, is clear.

By section 42 when there has been a deduction either actual or notional by reason of section 40 from a dividend then the amount so deducted can be set off by the recipient of the dividend against any tax payable by him when the dividend in question is included in his chargeable income on which the tax against which the deduction is being set off is chargeable. There are two points to be observed here. Whenever a deduction is made or is deemed to be made by reason of section 40 there comes into existence a credit which in effect will be used by some person at some time in settlement of income tax and in *pro tanto* diminution of the amount payable by him in cash. But such a deduction can only be set off against tax charged on the dividend from which it has been made when the dividend becomes part of the recipient's chargeable income which will be in the year after it is received because chargeable income for any year is based and calculated on the actual income for the preceding year (see sections 31, 33 and 34).

For example, if a company in 1955 made a profit of $10,000 and then in 1956 it made a profit of $20,000, then in 1956 the tax payable by it would be $3,000 (see section 39) but if it distributed all its profits in dividends the amount it would be entitled to deduct under section 40 would not be $3,000 but $6,000. In consequence of this deduction, to put it in popular language, $6,000 worth of certificates that would in effect be as good as money for payment of income tax in the future came into existence whereas only $3,000 had been payable. What happens after 1956 is of course irrelevant. The company may die, or it may run into a period of loss, or it may make greater profits. The truth, however, is that by its own voluntary act in paying a dividend of a certain amount it has created a position at the end of 1956 that has resulted in the creation of $3,000 worth of tax credits which do not correspond to any tax actually paid in the past and may or may not correspond to any tax payable in the future.

I would dismiss the appeal with costs.

Hill J.A.: This is an appeal from the decision of Smith J. in the High Court at Ipoh that the plaintiff/respondent should recover against the appellants/defendants the sum of $7,793. The respondent's claim was brought by virtue of section 40 of the Income Tax Ordinance and was based on the following assertions:—

> "The defendants deducted tax from their dividends paid during the period 1st January to 31st December, 1956, the sum of $22,515.
>
> The tax assessed for the year of assessment, 1956 was $14,722.
>
> The balance of $7,793 is therefore due and owing by the defendants to the plaintiff."

Against this claim the main argument of the Company was that infact it deducted no tax at all. On this issue Smith J. found in its favour. He stated:—

> "It is clear from the facts of this particular case that the company made no deductions of any kind whatsoever. It performed the purely ministerial function of distributing a dividend received from the *B* Omnibus Company."

Thereafter the learned trial Judge reasons as follows:—

> "To my mind the strength of the plaintiff's case is that the company is estopped from denying that it has in fact deducted tax. If a company declares a dividend

of a certain size and proceeds to distribute that dividend after deduction of tax I cannot see that it is entitled at a later stage to turn round and deny that it has in fact done so. If it does wish to do this then it must do what Salisbury House Estate, Ltd., did in *Neumann's* case, namely, issue corrected dividend warrants. What would be the effect of this does not concern me. However I consider that the company is estopped from denying that they have deducted the tax because they have elected, as the plaintiff said, to conduct their business in this particular manner. There must therefore be judgment for the plaintiff as prayed."

The question of estoppel was not raised or pleaded before Smith J. by the respondent for the good and sufficient reason that estoppel never arose. It is certainly all too clear that the Company made no tax deductions and the question now to be decided is whether sub-section (6) of section 40 of Ordinance No. 48 of 1947 as amended by section 6 of Ordinance No. 4 of 1956 should apply. Sub-section (1) reads as follows :—

" (1) Every company which is resident in the Federation shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at a rate not exceeding thirty per centum on every dollar of such dividend."

The rate incidentally is now 40% increased by Ordinance No: 53 of 1958.

The original section 40(1) read as follows :—

" (1) Every company which is resident in the Federation shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at the rate paid or payable by the company.....on the chargeable income of the year of assessment within which the dividend is declared....."

Sub-section (2) of section 40 reads as follows :—

" (2) Every such company shall upon payment of a dividend, whether tax is deducted therefrom or not, furnish each shareholder with a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend."

The underlining is mine.

In view of sub-sections (1) and (2) it seems to me that for any part of section 40 to apply the following conditions must be present, namely (i) the Company must be resident in the Federation, and (ii) the Company itself must have paid tax or be liable to pay tax at the fixed rate so as to be entitled to deduct tax in respect of dividends.

The income received and distributed by the appellate Company was not a chargeable or assessable income as tax deductions in full had already been made by the *B* Omnibus Company and in my view no further deductions could legally be made therefrom and the appellate Company was not therefore entitled to make any.

In my view section 40(1) and indeed the whole section must necessarily deal with and refer solely to an income from which tax is deductible. I am of opinion therefore that the section does not apply in the present case.

It is significant that the basis of the claim brought by the Government of the Federation of Malaya was that the Company had deducted tax from their dividends paid during 1956, not that the Company had conducted its business in such a manner as to render it liable for a debt under sub-section (6) of section 40 and section 41.

The fact that the Company unnecessarily, in my opinion, and incidentally incorrectly attempted to comply with sub-section (2) in issuing certificates to shareholders relating to tax deductions cannot and does not render them liable for a debt to Government. I feel satisfied that in such circumstances it is not intended to penalise a local company by rendering it liable for a debt to the Government and that on a correct interpretation of section 40, which I can only hope mine is, no such injustice is in fact inflicted.

I would therefore allow this appeal.

With regard to the appellant's counter-claim for $81,503.40, this appears to me to be just as fictitious as the respondent's claim and I would dismiss that part of the appeal relating to it.

I would award costs to the appellate Company here and in the Court below.

In conclusion I must confess that what I have written above has been written with considerable diffidence, for in considering this appeal I have been acutely aware of my own lack of knowledge and experience in the subject matter involved. I console myself, however, with the thought that what is involved appears to me to be a question of interpretation and it is as such that I have tried to deal with the matter.

Ong J.: This is an appeal from the judgment of Smith J. given in the High Court at Ipoh allowing a claim by the Government for a sum of $7,793 alleged to be a debt due by the appellants by virtue of sub-section (4) of section 40 of the Income Tax Ordinance, 1947.

The statement and particulars of claim are very brief and may usefully be set out in full :—

1. The plaintiff's claim is for the sum of $7,793 payable by the defendants to the plaintiff as a debt due by virtue of section 40 of the Income Tax Ordinance.

Particulars :

2. The defendants are a company incorporated in the Federation of Malaya under the Companies Ordinance.

3. The defendants deducted tax from their dividends paid during the period 1st January to 31st December, 1956 the sum of $22,515.

4. The tax assessed for the year of assessment, 1956 was $14,722.

5. The balance of $7,793 is therefore due and owing by the defendants to the plaintiff.

The facts are fully set out in the judgment of Smith J. and in that of the learned Chief Justice, and I need not repeat them. What I would emphasise is that the material facts were never in dispute, namely, that the appellants made no deductions whatsoever under section 40(1) before proceeding to distribute to their own shareholders the dividends paid by the *B*

Omnibus Company which had made the appropriate deductions at source. Moreover there is no suggestion that there ever had been anything clandestine in the conduct of the appellants' affairs, or that in any of their dealings with the Comptroller of Income Tax they had failed to show the utmost candour.

The appellants' contention is that, if no deductions were in fact made, as is admittedly the case here, section 40 has no application, because sub-sections (3), (4) & (5) refer only to deductions actually made. It is, however, contended on the part of the Government that in such event the deeming provisions of sub-section (6) come into operation, and, notwithstanding that no deductions had in fact been made, the appellants were caught squarely by this sub-section as by a Morton's fork. The sub-section reads as follows :

40(6): "For the purpose of this section, where any dividend has been paid without deduction of tax, such dividend or part thereof from which there was a title to deduct tax shall be deemed to be a dividend of such a gross amount as after deduction of tax at the rate deductible at the date of payment would be equal to the net amount paid; and a sum equal to the difference between such gross amount and the net amount paid shall be deemed to have been deducted from such dividend or part thereof as tax."

This case falls within a branch of the law that has been variously described by the most eminent of Judges as difficult, extraordinarily obscure and "illogical from top to bottom and any attempt to make it logical is necessarily open to criticism." Judicial interpretations of the provisions of income tax legislation dealing with the system of deduction of tax from dividends have revealed such divergences of opinions that I comfort myself with the reflection that in case I should err I do so in illustrious company if I differ, as I do with the deepest regret, from the opinion of the learned Chief Justice.

My views may be set out within a small compass. First, by sub-section (1) the Company has the option, but is not under any legal compulsion, to deduct. In my opinion the wording of sub-sections (3), (4) & (5), where the words "has been deducted" have been followed repeatedly by the words "so deducted", is a compelling reason why I should hold that, where no deduction had in fact been made, sub-section (4) does not apply and no doubt arises by operation of law. The claim therefore fails on this ground.

The further or alternative claim by the Government rests on sub-section (6). It is said that if the appellants so chose to arrange their affairs that by a statutory fiction a debt was created they had only themselves to blame. It seems to me that between this argument and the ground upon which Smith J. based his decision there is no perceptible dividing line. The learned Judge had said this :

"If a company declares a dividend of a certain size and proceeds to distribute that dividend after deduction of tax I cannot see that it is entitled to turn round and deny that it has in fact done so."

The question that falls to be decided is whether the true facts must perforce be shut out by the "deeming" provisions of the sub-section. In my opinion, sub-section (6) does not have that effect. It is true that when a thing is "deemed" something else, it is to be treated as that something else with the attendant consequences but it is not that something else: (*per* Cave J. in *R.* v. *Norfolk Co.*[2]). Nevertheless, as James L.J. said *Ex p. Walton*[3] :

"When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

The sub-section commences with the words: "For the purpose of this section". Section 40 relates to deduction of tax from dividends of companies. Sub-sections (3), (4) & (5) cover cases of actual deductions. Where no deductions are in fact made, the provisions of sub-section (6) come into play for the purpose of calculating the gross amount of dividend sum tax, "and a sum equal to the difference between such gross amount and the net amount paid shall be deemed to have been deducted from such dividend or part thereof as tax."

All these sub-sections (3), (4), (5) & (6) must, in my view, be read with and in the light of sub-section (2), which is as follows :

"(2) Every such company shall upon payment of a dividend, whether tax is deducted therefrom or not furnish each shareholder with a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend."

Sub-sections (2), (3) & (4) come within one compartment and sub-section (6) within another distinct compartment. They cover the two alternatives, when a company chooses to deduct, or not to deduct. Provisions made to apply where no deduction is made cannot, in my opinion, be construed to modify provisions which create a debt to the Government only when an actual deduction has been made.

What if so, it may be asked, is the purpose of sub-section (6)? For answer I cannot do better than quote Sir Wilfrid Greene M.R. (as he then was) in *Indand Revenue Commissioners* v. *Cull*[4] :

"A company pays tax on its profits measured by the rules for the time being in force. It pays a dividend out of its profits. In making the payment it is entitled to deduct tax at the standard rate current at the time irrespective of the rate of tax prevailing when the profits were made and irrespective of the fact that for the year in which the dividend is paid the profits as assessed to tax may be nil or less than the actual profits of the year used for payment of the dividend. The shareholder *for all purposes of his return of total income* is treated as having received a dividend equal to the net amount plus the tax deducted, that is, his dividend is grossed up by adding back the tax."

The sub-section only provides, in effect, that for the purposes of ascertaining a taxpayer's taxable income the dividends in his hands must

be grossed up in compiling his tax returns, the grossed-up figure being that on which his tax is assessed. Such is the object and purpose of the sub-section, not to create a debt when none in fact exists. I am therefore of opinion that the claim of the Government under sub-section (6) cannot be sustained.

Whether I am right or wrong in my decision on the grounds above-stated, it also seems to me that, under sub-section (3) "the tax which has been deducted from all dividends paid to shareholders during such year of assessment" should be compared with "the amount of the tax payable by the company in respect of such year of assessment." The tax payable by the appellants in 1956 was $14,722 and not $22,515; the larger sum was the amount payable by them in 1957. The tax paid by the appellants for the year of assessment 1956 was $14,722. In expressing my own view on this point, I would say, with the greatest respect for views to the contrary, that I think the amount of tax deducted and paid during any year of assessment should be compared only with the tax payable in the same year of assessment, and not with that of a different year, which was the year subsequent in the instant case. On the figures of tax payable and the tax paid for the year of assessment 1956, there was clearly no debt due under sub-section (4).

I have also had the advantage of reading the judgment of Hill J.A. while in course of preparing my own, and with his opinion and the reasons given I respectfully express my concurrence and also with the order proposed.

Appeal allowed.

Solicitors: *Das & Co.; Rodyk & Davidson.*

LEE CHONG v. TAN KWEE LOW & ANOR.

[C. A. (Thomson C.J., Hill J.A. and Rigby J.) December 14, 1960]

[J.B. — F.M. Civil Appeal No. 32 of 1960]

Negligence — Agency — Bailment — Negligent driving of motor vehicle — Whether owner liable.

The 1st defendant, the owner of a car, allowed his brother-in-law to borrow his car with the knowledge that the car was to be lent to the 2nd defendant for use for a period of 10 days. Whilst the 2nd defendant was driving the car, some days later, he was involved in a collision with the plaintiff. The 2nd defendant was not covered by any third party risks insurance, and the plaintiff was therefore left to recover such damages as he might by suing the defendants.

On the evidence before him the learned trial Judge held that the transaction between the parties was not a bailment of the car by the 1st defendant to his brother-in-law for use by the 2nd defendant. He held that at the time of the accident the 2nd defendant was driving the car as the agent, whether express or implied, of the 1st defendant, and accordingly the 1st defendant was liable to the plaintiff. On appeal,

Held: the 1st defendant had parted with his car unconditionally, retaining neither control nor the right to exercise any control over it. It was a clear instance of bailment and accordingly the 1st defendant was not responsible for the negligence of the 2nd defendant.

Per Rigby J.: "In all these cases where injury was caused to the person or property of a third party as the result of the negligent driving of a motor-car driven by a person other than the owner, vicarious liability was held to attach to the owner only by reason of the fact that he was physically present in the car at the time and, therefore, deemed to retain the right of dominion and control, (see *Samson* v. *Aitchison* (6) and *Pratt* v. *Patrick* (9)), or that he retained control through his servant who was present in the car (see *Reichardt* v. *Shard* (7) and *The Trust Co. Ltd.* v. *De Silva* (10)), or that the car was being driven by the person at the request of the owner in pursuance of what Du Parcq L.J. in *Hewitt* v. *Bonvin* (4) described, and Devlin J. in *Ormrod & Anor.* v. *Crosville Motor Services Ltd.* (5) adopted, as 'a social and moral obligation to drive the car'. In the case under consideration in this appeal there was no evidence that the 1st defendant had in any way reserved the right of control over the motor vehicle to himself or that the 2nd defendant was acting as his servant or agent."

Judgment of Neal J. reported in [1960] M.L.J. 212 reversed.

Cases referred to:—

(1) *Turbervil* v. *Stamp* (1697) Comb. 459.
(2) *Barnard* v. *Sully* 47 T.L.R. 557.
(3) *Britt* v. *Galmove and Nevill* 44 T.L.R. 294.
(4) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.
(5) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753.
(6) *Samson* v. *Aitchison* [1912] A.C. 844 at p. 850.
(7) *Reichardt* v. *Shard* (1941) 31, T.L.R. 24.
(8) *Du Cros* v. *Lambourne* [1907] 1 K.B. 40.
(9) *Pratt* v. *Patrick* [1924] 1 K.B. 488.
(10) *The Trust Co. Ltd.* v. *De Silva* [1956] 1 W.L.R. 376.
(11) *Parker* v. *Miller* 42, T.L.R. 408.
(12) *Raja Singh* v. *Chin Fatt* [1936] M.L.J. 157.
(13) *Monk* v. *Warbey & Ors.* [1935] 1 K.B. 75.

COURT OF APPEAL.

P. P. Dharmananda for the appellant.

L. A. J. Smith for the 1st respondent.

2nd respondent absent.

Thomson C.J.: I have had the benefit of reading the judgment of Rigby J. in this case with which I am in entire agreement.

I wish to add only a very few words of my own.

As is pointed out by the late Professor Holdsworth in his "History of English Law" (volume VIII p. 474) "the foundation of the modern law" relating to the vicarious liability of a master or principal for the torts of his servant or agent is to be found in a series of judgments of Holt C.J. towards the end of the 17th century. To this day what is probably the most helpful and compendious statement of the law on the point is to be found in the case of *Turbervil* v. *Stamp*(1) :—

"If my servant doth any thing prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business."

In view of the nature of some of the arguments which have been addressed to us in the present case I hasten to add that in my view this statement is equally true if the word "agent" be substituted for the word "servant". The important words are "being about my business."